

MAINE STATE LEGISLATURE

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*Counsel Fees Re: the Pollution Control
38 11 10 411*

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

TO: Henry E. Warren, Commissioner
Department of Environmental Protection

FROM: Cabanne Howard, Assistant Attorney General

DATE: 31 August 1978

SUBJECT: Funding of Counsel Fees of Moosehead Sanitary District

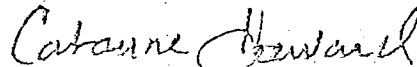
You have asked whether it is legally permissible for the Department of Environmental Protection to use funds available to it for the municipal and quasi-municipal pollution abatement construction program to provide counsel fees to the Moosehead Sanitary District to finance a lawsuit to recover consequential and incidental damages arising from the malfunctioning of a wastewater treatment plant constructed with such funds. Our answer is that such use of these funds is not permitted by statute.

The facts as we understand them are as follows. From 1971 to 1976, the Department provided the Moosehead Sanitary District approximately \$550,000 as its share of the design and construction costs of a wastewater treatment plant. This amount constituted 25% of the total cost of the project, the Federal government providing the remaining 75% pursuant to Subchapter II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1281 et seq. The District contributed no money to the construction of the plant. The plant has never functioned properly and, at the end of 1977, the District, with the concurrence of the State and Federal government, determined to abandon it. The District then brought suit against the contractor to recover not only the construction costs, which presumably it would refund to the state and federal government, but other damages which it terms "consequential or incidental." The State has subsequently moved to intervene in the suit, in order to recover its share of the construction costs directly.

The relevant statute is 38 M.R.S.A. §411, which provides, in pertinent part:

The department is authorized to pay an amount at least 15%, but not to exceed 25%, of the expense of a municipal or quasi-municipal pollution abatement construction program which has received federal approval and federal funds for construction. State grant-in-aid participation under this section shall be limited to grants for waste treatment facilities, interceptor systems and outfalls. The word "expense" shall not include costs relating to land acquisition or debt service.

The legislative history of this provision is silent as to whether it may be read to include the use of the funds authorized therein for counsel fees. It provides only that money may be spent for "waste treatment facilities, interceptor systems and outfalls," and may not be spent for "land acquisition expenses or debt service." However, it is not necessary here to reach the question as to whether the funds may ever be used to pay counsel fees as a general category of expenses. The primary purpose of the District's suit in this case is to recover its own "consequential and incidental" damages from the failure of its plant. It has also claimed the State's construction costs as well, but the State has chosen to pursue those directly. Thus, the narrow question presented is whether funds authorized under Section 411 may be used by the Department to fund an effort by a recipient of construction funds to recover damages other than those occasioned by the actual loss of those funds. This would appear to be well beyond any reasonable interpretation of legislative intention. The Legislature cannot be found to have authorized the use of construction funds to finance the recovery of other damages incurred by its recipients.



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